UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 452441
Issued to: William L. Heuer, Jr.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2192

William L. Heuer,Jr.

This appeal had been taken in accordance with Title 46 U.S.C. 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 7 March 1978, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, after a hearing on various dates between 22 July 1977 and 9 March 1978, suspended Appellant's license for a period of three months on probation for twelve months upon finding him guilty of negligence. The single specification of the charge of negligence found proved alleges that Appellant, while serving as pilot aboard SS SABINE, under authority of the captioned document, did, on or about 3 June 1977, at or near Chalmette Algiers Ferry Crossing, lower Mississippi River, negligently operate said vessel by overtaking SS SITALA without having received an assenting whistle signal as is required by the ordinary practice of seamen.

At the hearing Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced into evidence the testimony of four witnesses and eight documents.

In defense, Appellant introduced into evidence the testimony of two witnesses and the responses to interrogatories of a third witness.

Upon conclusion of the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification as alleged had been proved. He then entered an order suspending Appellant's license for a period of three months on probation for twelve months.

The decision was served on 9 March 1978. Notice of Appeal was timely filed on 6 April 1978, and perfected on 30 October 1978.

FINDINGS OF FACT

On 3 June 1977, Appellant was serving as pilot aboard SS SABINE and acting under authority of his license while the vessel was underway in the lower Mississippi River. Because of the disposition of this appeal, no further findings are necessary.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Because of the disposition of this appeal the arguments offered by Appellant will not be addressed.

APPEARANCE: McClendon and Denkman, Metairie, Louisiana, by W. Frederick Denkman, Esq.

OPINION

Appellant originally was charged with the three specifications, substantially as follows:

I. That Appellant, while serving as pilot aboard SS SABINE, under authority of the captioned document, did, on or about 3 June 1977, at or near the Chalmette-Algiers Ferry Crossing, mile 88.6 above Head of Passes, lower Mississippi River, negligently operate said vessel by overtaking SS SITALA without having received an assenting whistle signal as is required by the ordinary practice of seamen.

II. That Appellant, while serving as aforesaid, did, on or about 3 June 1977, negligently operate said vessel by navigating across the bow of SS SITALIA after overtaking it, in contravention of the ordinary practice of seamen.

III. That Appellant, while serving as aforesaid, did, on or about 3 June 1977, negligently and unnecessarily overtake SS SITALIA and navigate SS SABINE between SS SITALIA and the Ferry Vessel THOMAS JEFFERSON in a manner which, on account of the proximity of the vessels involved, endangered the lives and property of others.

Upon the conclusion of the Coast Guard the case in chief, the Administrative Law Judge dismissed the third specification because "there was no proximity of the vessels involving endangering life and property of the THOMAS JEFFERSON in the evidence in this case." R.237.

Upon entering his decision and order, the Administrative Law Judge also dismissed the second specification because he was "unable to reach an affirmative factual finding in respect to the distance between the tankers when SABINE crossed the extended bow line of SITALIA, nor [could he] find that the distance was

hazardous."

In light of the earlier dismissal of the second and third specifications, I am constrained to a consideration of the first alone. Based upon my examination of the record, and my analysis of the law and policy, I must dismiss the remaining specification and the charge.

"A specification should be so framed that if all its allegations are found established the offense charged must be found proved." Decisions on Appeal Nos. 1739, 2013, 2155. The one specification found proved contains a single factual allegation, that Appellant overtook SS SITALIA without having received an assenting whistle signal. The specification also contains the standard of conduct allegedly violated, "the ordinarily practice of seamen."

As I previously have stated in addressing this issue of assent in a similar overtaking situation, "[t]he rule [Rule VIII of the Inland Rules (33 U.S.C. 203)] does not expressly prohibit overtaking without receipt of a reply." Decision on Appeal No. 1993. However, I further recognized that "an overtaking vessel may properly pass an overtaken vessel without having received an assent to its proposal when the situation is clearly safe for such a maneuver and the cooperation of the other vessel is not required, and no collision occurs."

It is apparent then that it is not improper for an overtaking vessel to pass an overtaken vessel without assent and when no collision occurs, provided two conditions are satisfied. The situation must be "clearly safe" and the "cooperation" of the overtaken vessel must not be required. Hence, a specification which alleges merely that Appellant operated his vessel so as to overtake another "without having received an assenting whistle signal," and which alleges no other salient facts, alleges no offense. Inclusion of the purported standard of conduct allegedly violated, viz., "the ordinary practice of seamen," in an otherwise factually deficient specification will not suffice to correct the deficiency. Decision on Appeal No. 2045; Cf., Decision on Appeal No. 2155, (addition of the word "wrongfully" to a factually deficient specification does not cure the defect.)

The deficiency of this specification notwithstanding, further consideration of the matter is not foreclosed. Under the rationale of Kuhn v. C.A.B., 183 F. 2d 839(D.C. Cir. 1950), I normally would not be preclude from correcting the specification and finding it proved, "if the issues involved were actually litigated and there had been actual notice and an opportunity to cure surprise." Decision on Appeal No. 2045. However, because of the posture of

this case on appeal to me, I have no choice but to dismiss.

As set forth above, three specifications originally supported the charge of negligence. The evidence adduced at the hearing tended to prove elements of both the first and the third specifications, viz., that Appellant overtook SITALA without awaiting an assenting whistle signal and, in overtaking, navigated SABINE in a fashion which was unsafe. The Administrative Law Judge construed the third specification narrowly and dismissed it because he found, as a fact, that there was no danger to lives and properly aboard the Ferry Vessel THOMAS JEFFERSON. I do not construe the third specification so narrowly. This specification does not refer to the endangering of only THOMAS JEFFERSON; rather, it addresses the endangering of "the lives and property of others" without additional qualifications. Hence, in the factual circumstances present within this case, the finding of the Administrative Law Judge, that Appellant did not endanger the lives and property of others while overtaking SITALA, necessarily negates a separate finding that his navigation while accomplishing this same maneuver somehow was negligent. Cf., Decision on Appeal No. 881 (dismissal of two specifications by a Hearing Examiner, after a hearing on the merits, necessitated dismissal of a third specification because several factual issues, essential to proof of that third specification, had been resolved in Appellant's favor by the Hearing Examiner).

If dismissal of the third specification in this case was error, I shall not correct it. To do so would require that I reinstate the specification in toto, or at least merge it with the first specification. Either of these actions presumably is permissible under the provisions of the Administrative Procedure Act, specifically 5 USC 557(b). Nevertheless, my policy normally has been to not reinstate charges,or specifications thereunder, which have been dismissed by an administrative law judge. See, e.g., Decision on Appeal No. 976. I discern no reason in this case for making an exception to that policy.

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana, on 7 March 1978, is VACATED and the charge DISMISSED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed in Washington, D.C. this 24th day of March 1980.

INDEX